EDITORIAL

From 'Flatulence Taxes' to 'Condom Taxes': Excises as the New Frontier for EU Tax Law

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Traditional excise taxes on products such as sugar or salt, common until the nineteenth century, have been progressively eradicated from domestic tax systems, substituted by more sophisticated tax instruments, such as income and value-added taxes. Yet, now they are back; not (largely) as revenue mobilizers, but as regulatory tools, designed to achieve an ever increasing range of policy aims. The new Chinese 'condom tax' and the proposed Danish 'flatulence tax' may be novel, but the nature of the developments is not; on the contrary, these measures are part of a wider global trend. Although, this resurgence of excise taxes has significant implications for the design of tax systems worldwide, for the EU they present an additional challenge, namely whether to harmonize or not to harmonize? Until now, EU harmonization of excise taxes has been limited to a small number of traditional commodities: alcohol, tobacco, energy; but as the variety of excise taxes, and the number of Member States applying them, grows, is this position sustainable, not least given the constitutional mandate set out in Article 113 of the Treaty on the Functioning of the European Union (TFEU)?

Keywords: EU tax harmonization, regulatory taxes, consumption taxes, excise taxes, condom tax, flatulence tax, meat tax

In June 2024, at the heat of the UK parliamentary elections' campaign, *The Guardian* reported on an incredible story from the campaign trail. Campaigning in a relatively deprived area of Northern England, a candidate for the Labour Party approaches a voter on the doorstep. The voter openly declares that he had been planning to vote for Labour, but had changed his mind upon hearing that the Labour Party intended to tax condoms. '*Condoms?*', the Labour candidate asked, surprised; '*yes*', the voter answered, '*I heard you are taxing condoms, and I'm not having it*'. With the help of his parliamentary assistant, the Labour candidate finally works it out and clarifies: '*we are taxing non-doms, not condoms*', he says; '*ah*', responds the voter, '*like the prime minister's wife?*', he calls out to his own wife, '*Margaret: they're taxing non-doms, not condoms*'.[1]

The UK Labour Party may not have actually been proposing to tax condoms, but China has recently announced just that. After years of steep decline in birth rates, China has introduced a package of tax measures to encourage childbirth, including what has been dubbed a 'condom tax'.[2] Starting from 1 January 2026, China abolished its thirty years old VAT exemption on all contraceptives, including condoms and birth control pills, subjecting those products to 13% VAT rate. Of course this measure is not *(1)* a new tax, nor *(2)* a tax just on condoms, but the measure – and the nickname it was given – signal an important, and all too serious, tax policy development: China is now using consumption taxes as a regulatory tool in its quest to reverse, or at least limit, demographic decline and population ageing.

The Chinese measure came just one year after the announcement of yet another first-ever regulatory tax measure: the so-called 'flatulence' or 'fart tax'. In November 2024, Denmark announced the '*world's first flatulence tax*': from 2030, farmers will have to pay a tax on their cattle's methane emissions.[3] Although, the tax will technically apply – similarly to some sugar taxes – to the production, rather than the consumption, of meat, its incidence is clearly envisaged to be on the consumer, and is therefore a de facto regulatory tax on meat consumption. The policy aim is straightforward, namely to reduce the high emissions level from the farming industry, as part of the effort to reach global climate targets.

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1 D. Boffey, *We're Taxing Non-doms, not Condoms!: Labour Strives to Reconnect With Disengaged Voters* (The Guardian 27 Jun. 2024). At the time, I commented on a LinkedIn post that, twenty-five years in tax, and nothing I could say would ever come close to this story.

2 O. Chia & Y. Chen, *Condom Tax and Cheaper Childcare: China's Plan to Boost Birth Rates* (BBC News 31 Dec. 2025).

3 H. Khalil, *Flatulence Tax: Denmark Agrees Deal for Livestock Emissions Levy* (BBC News 18 Nov. 2024).

Although, the type of products targeted by both these measures may be novel, the nature of the developments is not; on the contrary, these measures are part of a wider global trend. Traditional excise taxes on products such as sugar or salt, common until the nineteenth century, had been progressively eradicated from domestic tax systems, substituted by more sophisticated tax instruments, such as income and value-added taxes.[4] Yet, they are now back; not (largely) as revenue mobilizers aimed at financing war efforts, but as regulatory tools, designed to achieve an ever increasing range of policy aims. The resurgence of excise taxes has significant implications for the design of tax systems worldwide, not least due to the challenges it presents in terms of the distributional impact – these taxes are largely regressive – and the risks they carry for large scale fraud.[5] For the EU, however, they present an additional challenge, namely whether to harmonize or not to harmonize? Until now, EU harmonization of excise taxes was limited to a small number of traditional commodities: alcohol, tobacco, energy; but as the variety of excise taxes, and the number of Member States applying them, grows, is this position sustainable, not least given the constitutional mandate set out in Article 113 of the Treaty on the Functioning of the European Union (TFEU)?

1 The growth of regulatory taxation

The global history of taxation is replete with stories of taxes that altered taxpayers' behaviour in unexpected and often surprising ways: taxes explain, for example, why windows in old UK buildings are sometimes bricked-up (windows tax), why Hungarian's cuisine favours pork dishes (sales tax), or why Dutch old houses are often narrow (land tax).[6] Until this century, however, those behavioural changes were largely unintended. Today, on the contrary, the regulatory function of the tax system is not only well established, but can be felt across the whole modern tax systems.[7] Many tax instruments include some regulatory element – from personal income tax credits for education expenditure, to measures designed in the direction of encouraging corporate income tax competition – but more significantly, tax instruments specifically designed as regulatory tools, such as excise taxes on alcohol, tobacco or fuel, are now a common feature of most modern tax systems.

Indeed, until recently modern excise taxes were limited to a relatively small range of commodities, focussing on products with well-known negative externalities in healthcare (tobacco, alcohol), or the environment (fuel). Over the last two decades, however, this approach has quietly, but surely, changed. Today, taxes are increasingly seen as the most appropriate regulatory instrument for dealing with a variety of societal problems: from obesity to climate change.[8] The range of products to which excise taxes apply has therefore also been growing: products traditionally subject to excise taxes are now but a fraction of the range of goods and services subject to excise taxes worldwide; these include sugar, fat, marijuana, plastics, gambling, air transport, and motor vehicles. The new Chinese 'tax on contraceptives', and the approved Danish tax on cattle emitted methane cannot therefore be seen in isolation, but merely as the most recent developments in an ongoing trend.

Why has regulatory taxation become so popular? There are of course many reasons, not least their potential – although by no means guaranteed – effectiveness, as well as important political economy factors.[9] A significant contributor to their success, however, which cannot be dissociated from those political economy factors, is the message they send. Indeed, it is evident from the choice of commodities that are most commonly subject to excise taxes, that these taxes have, throughout the centuries, been often associated with morality concerns, and that *moral judgments* contributed to what has been designated as the 'politics of fiscal discrimination'.[10] This morality element is particularly evident as regards alcohol taxes,[11] as regards which as far back as the eighteenth century, some Governments sought to justify them with primary reference to reforming the behaviour of the lower social classes.[12] It is also present in other historical excise taxes, however, not least in the so-called 'sex taxes': taxes

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4 R. de la Feria & V. Rahal Canado, *The Global Resurgence of Excise Taxation,* 73(2) British Tax Review (2026) 2.

5 These challenges are comprehensively addressed in de la Feria & Rahal Canado, *supra* n. 4.

6 For these and many other fantastic tax stories, *see* M. Keen & J. Slemrod, *Rebellion, Rascals, and Revenue: Tax Follies and Wisdom Through the Ages* (Princeton University Press 2021).

7 R. Avi-Yonah, *Taxation as Regulation: Carbon Tax, HealthCare Tax, Bank Tax and Other Regulatory Taxes*, 1(1) Acct. Econ. & L. (2011), doi: 10.2202/2152-2820.1008.

8 European Commission, *Annual Report on Taxation 2023* (Luxembourg: Publications Office of the European Union 2023). *See also* S. Cnossen, *Excise Taxation to Preserve Health and to Protect the Environment: A Review*, 70 Can. Tax J. 159–184 (2022), doi: 10.32721/ctj.2022.70.supp.cnossen.

9 These arguments are further developed in de la Feria & Rahal Canado, *supra* n. 4.

10 M. Daunton, *Trusting Leviathan: The Politics of Taxation, 1799–1914* (Cambridge University Press 2001); and W. F. Shughart II, *Selective Consumption Taxes in Historical Perspective*, in *For Your Own Good: Taxes, Paternalism, and Fiscal Discrimination in the Twenty-First Century* (A. J. Hoffer & T. Nesbit eds, Arlington, George Mason University 2018).

11 J. Thorndike, *Their Fair Share: Taxing the Rich in the Age of FDR Get Access Arrow* (Washington: Urban Institute 2013).

12 H. Yeomans, *Taxation, State Formation, and Governmentability: The Historical Development of Alcohol Excise Duties in England and Wales*, 42 Soc. Sci. Hist. 269–293 (2018), doi: 10.1017/ssh.2017.47.

imposed throughout history, including within the Roman Empire, Ancient Greece and by various Catholic Church's Popes, on prostitution.[13]

In modern excise taxes this morality element is omnipresent, as evidenced by the common framing of these excises as 'sin taxes'. The term sin, used in this context, does not have a strict religious meaning, rather it is designed to elicit negative emotions, reflecting social views of the targeted product or activity. Today's excise taxes echo therefore to a large extent our understanding of 'what is bad' from a societal perspective, a symbolic expression of disapproval.[14] The rapid spread in food-related excises, such as sugar, fat or ultra-processed taxes, for example, has been often linked to raising concerns about weight,[15] and an increased reframing of obesity as a moral rather than health issue.[16]

The 'tax' label itself – not merely the act of taxation – reinforces this narrative. While for a long time there was limited empirical evidence for it, a 'tax aversion label hypothesis' was often suggested,[17] and there were various anecdotal examples of the use of the tax word in policy narratives to invoke negative emotions.[18] Recent empirical evidence suggests, however, that the use of the word tax does indeed decrease support for identical policies by six to eight percentage points.[19] Associating the word to specific activities and/or commodities has therefore two potential effects: on one hand, it symbolizes policymakers' expression of disapproval; on the other hand, it can increase political and public acceptability, as the proposed tax targets solely (supposedly) socially undesirable, morally reproachable activities. The regulatory message of the Danish 'flatulence tax' or the Chinese 'condom tax' is therefore clear: consuming cattle meat is socially frowned upon, using contraceptives is now regarded as an anti-social behaviour; taxing these activities is consequently legitimate, and pro-social. In Denmark it is already working, even before the tax comes fully into force: a new study of food consumption habits has found that 48% of consumers are decreasing their meat intake; in areas where the tax was piloted, a 40% drop in beef consumption and a 20% drop in lamb consumption were reported.[20]

Given the higher political acceptability of these taxes,[21] and their general effectiveness, this global trend is unlikely to abate. Although, this trend has significant implications for tax systems worldwide,[22] for the EU they present an added challenge, namely its potential consequences on the functioning of the internal market, and how to deal with them.

2 Challenges and trade-offs for EU Tax Law

There is, of course, no legal basis for EU harmonization of regulatory taxes *per se*, but Article 113 TFEU does set out a clear constitutional mandate regarding the harmonization of excise taxes. This mandate – conveyed by the use of the word '*shall*', rather than the word '*may*' – requires the EU institutions to approve harmonizing legislation to '*the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition*'.[23] As such, since 1992, the EU has approved various Directives regarding the harmonization of several excise taxes, namely those referred in Article 1(1) of Directive (EU) 2020/262 as taxes on 'excise goods': alcohol, tobacco and energy products.[24] Yet, these are but a fraction of the excise taxes, or wider regulatory taxes, now applicable throughout the EU: some are only applied by one Member State – such as the new 'flatulence tax'; others by several Member States – as is the case with sugar taxes; and others still by all Member States – for

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13 Keen & Slemrod, *supra* n. 6, at 190–191. *See also* C. A. Nelson, *Receipt for Tax on Prostitutes*, 32(1/2) Bull. Am. Soc'y Papyrologists 23–33 (1995); and M. Kornhauser, *Taxing Bachelors in America, 1895-1939*, in *Studies in the History of Tax Law*, vol. 6 467–488 (J. Tiley ed., Oxford: Hart Publishing 2013).

14 P. Lorenzi, *Sin Taxes*, 41(3) Soc'y 59–65 (2004), doi: 10.1007/BF02690184; P. Lorenzi, *The Moral Grounds of Sin Taxes*, 44(1) Soc'y 67–71 (2006), doi: 10.1007/BF02690470; and P. Lorenzi, *Taxing Antisocial Behaviour for the Common Good*, 47(4) Soc'y 328–332 (2010), doi: 10.1007/s12115-010-9337-z.

15 L. Monaghan et al., *Media, 'Fat panic' and Public Pedagogy: Mapping Contested Terrain*, 13(1) Soc. Compass (2019), doi: 10.1111/soc4.12651.

16 M. Penkler et al., *Diagnostic Narratives: Creating Visions of Austria Society in Print Media Accounts of Obesity*, 37(3) Sci. Comm. 314–339 (2015), doi: 10.1177/1075547015575791; and S. Inthorn & T. Boyce, *It's Disgusting How Much Salt You Eat! Television Discourses of Obesity, Health and Morality*, 13(1) Int'l J. Cultural Stud 83–100 (2010), doi: 10.1177/1367877909348540.

17 D. Gamage & D. Shanske, *Three Essays on Tax Salience: Market Salience and Political Salience*, 65 Tax L. Rev. 23 (2011); K. Blaufus & A. Möhlmann, *Security Returns and Tax Word Aversion Bias: Behavioral Responses to Tax Labels*, 15(1) J. Behav. Fin. 56–69 (2014), doi: 10.1080/15427560.2014.877017.

18 For example *see* R. de la Feria & M. Walpole, *The Impact of Public Perceptions on General Consumption Taxes*, 67(5) Brit. Tax Rev. 637–669 (2020).

19 E. Brunner et al., *Experimental Evidence About Property Tax Word Aversion*, 41(4) Pub. Budgeting & Fin. 50–70 (2021), doi: 10.1111/pbaf.12284.

20 Smart Protein, *Evolving appetites: an in-depth look at European attitudes towards plant-based eating* (2024).

21 Although there are limits to this acceptability, particularly as regards environmentally-focused excise taxes, *see* S. Kallbekken et al., *Do You Not Like Pigou, or Do You Not Understand Him? Tax Aversion and Revenue Recycling in the Lab*, 62 J. Envtl. Econ. & Mgmt. 53–64 (2011), doi: 10.1016/j.jeem.2010.10.006; and M. Tatham & Y. Peters, *Fuelling Opposition? Yellow Vests, Urban Elites, and Fuel Taxation*, 30(3) J. Eur. Pub. Pol'y 574–598 (2022), doi: 10.1080/13501763.2022.2148172.

22 *See* further, de la Feria & Rahal Canado, *supra* n. 4.

23 On the scope and implications of this mandate, *see* R. de la Feria, *The EU VAT System and the Internal Market* (Amsterdam: IBFD 2009).

24 Council Directive (EU) 2020/262 of 19 Dec. 2019 laying down the general arrangements for excise duty. Hereafter referred to 'Excise Duties Directive'.

example, motor vehicles taxes.[25] As a result, excise taxes on these products not expressly covered within the scope of the Excise Duties Directive, have fallen on a quasi-EU legal vacuum.

Quasi because, notwithstanding the lack of full harmonization, the EU legislator does introduce a minimum level of harmonization of other excise taxes in Article 1(3) of the Directive,[26] where it states that, '*levying of such taxes may not, in trade between Member States, give rise to formalities connected with the crossing of frontiers*'. Although the introduction of restrictions to intra-EU trade is already significantly limited by the fundamental freedoms, as set out in the TFEU and interpreted by the Court, it is clear that the EU legislator, insofar as excise taxes are concerned, felt the need to reinforce those limitations at secondary legislation level. This has important implications on the interpretation of what constitutes a restriction to the EU internal market for the purposes of excise taxes which are not fully harmonized.[27] Although the Court has consistently used a similar formula in decisions on those excise taxes as for incomes taxes, namely that, '*Member States may introduce or maintain taxes on these goods, {however} they must exercise their competence in that field in a manner that is consistent with EU law*',[28] it can be convincingly argued that the TFEU free movement provisions, read in conjunction with Article 1(3) of the Directive, must necessarily be interpreted as determining that the standard of constitutional judicial review and scrutiny applicable to those excise taxes must nevertheless be greater than that applied to incomes taxes.[29]

Yet, given the growth in excise taxation, is reliance on these provisions alone a sustainable approach? Until now, the relatively low salience and visibility of these taxes have allowed EU institutions to largely ignore the impending dilemma, while making a de facto – most likely unconscious, or at least semi-unconscious – decision in favour of non-harmonization. Inaction is in itself an option. As the trend deepens, however, it is unlikely that this will remain a sustainable approach. With excise taxes affecting an increasing number of industries, lack of harmonization will unavoidable lead to distortions in competition – even on non-cross border transactions – creating an obstacle to the functioning of the internal market, and therefore falling under the scope of the constitutional mandate set out in Article 113 TFEU.[30] In the face of the quasi-legal vacuum, growing economic distortions will likely result in a rise in litigation, with the Court increasingly asked to play the role of constitutional adjudicator – a role which has been playing in income taxes since the decision in *Avoir Fiscal* in 1986.[31] In this scenario, can EU institutions, and in particular the Commission and the Council, continue to ignore the constitutional mandate set out in Article 113 TFEU?

The obvious argument against full or at least partial harmonization of excise taxes is a concern over the loss of tax sovereignty. This is indeed a legitimate concern. What is less clear, however, is whether further harmonization of excise taxes would: *(1)* actually result in a loss of sovereignty, or whether that sovereignty is already at least partially lost in the context of the existing EU constitutional framework, and the increased globalization and integration of the economy; and *(2)* carry more important tax sovereignty losses than economic growth and welfare gains. First, as regards the illusion of tax sovereignty, it is important to note that the experience with income versus VAT jurisprudence demonstrates that, contrary to intuition, minimum harmonization arguably results in a higher standard of judicial review and CJEU scrutiny than full harmonization, as regards which the Court feels less free to intervene, superimposing itself to the will of the EU secondary legislator.[32] Second, it is also important to acknowledge that the costs of non-harmonization are large, and can go well beyond distortions to competition. For example, in the absence of tax harmonization, the intervention of the Court to remove distortions or tax restrictions to free movement can have a negative effect on economic integration, capital costs, and overall welfare[33]; it can also have a significant impact on tax uncertainty levels, by resulting over-use of alternatives to integration, such as soft law,[34] which in turn can have a significant impact on investment decisions.[35]

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25 R. de la Feria, *Non-(Fully) Harmonised Excise Taxes and Irrebuttable Presumptions*, 33(3) EC Tax Rev. 98–108 (2024), doi: 10.54648/ecta2024013. The possible desirability of harmonising these taxes has long been on the EU agenda, *see* M. Radvan, *Motor Vehicles Taxation in the European Union – Cooperation or Competition?,* 5(1) Law, Identity and Values 107–125 (2025). doi: 10.55073/2025.1.107-125

26 On the different levels of harmonization *see* P. J. Slot *Harmonisation,* 21 Eur. L. Rev. 378–397 (1996), doi: 10.54648/eulr2010018. *See also* S. Weatherill, *The Fundamental Question of Minimum or Maximum Harmonisation,* in *The Internal Market 2.0* (S. Garben & I. Govaere eds, Oxford: Hart Publishing 2020).

27 As discussed in detail in de la Feria, *supra* n. 24.

28 Cases C-402/14, *Viamar*, ECLI:C:2015:830, para. 39; and C-451/99, *Cura Anlagen*, ECLI:EU:C:2002:195, para. 40.

29 This argument is further developed in de la Feria, *supra* n. 24.

30 On the scope and significance of the reference to '*distortions to competition*' in Art. 113 TFEU, *see* in particular landmark Cases C-300/89, *Commission v. Council (Titanium Dioxide)*, ECLI:EU:C:1991:115; and C-376/98, *Germany v. Parliament and Council (Tobacco Advertising)*, ECLI:EU:C:2000:544.

31 Case 270/83, *Commission v. France*, ECLI:EU:C:1986:37.

32 This argument is further developed in R. de la Feria, *VAT and the EC Internal Market: The Shortcomings of Harmonisation*, in *Traditional and Alternative Routes to European Tax Integration* 267–308 (D. Weber ed., Amsterdam: IBFD 2010).

33 R. de la Feria & C. Fuest, *The Economic Effects of EU Tax Jurisprudence*, 41(1) Eur. L. Rev. 44–71 (2016), doi: 10.2139/ssrn.2718118.

34 This argument is further developed in R. de la Feria, *Pillar 2, Fiat, and the EU Unanimity Rule on Tax Matters*, (1) EC Tax Rev. 2–8 (2023), doi: 10.54648/ecta2023001.

35 This literature is reviewed in R. de la Feria, *Anti-avoidance Rules, Tax Certainty and Procedural Justice*, forthcoming. *See* in particular, H. Gulen & M. Ion, *Policy Uncertainty, and Corporate Investment*, 29 Rev. Fin. Stud. 523–564 (2016), doi: 10.1093/rfs/hhv050.

This, of course, is not to say that there are no tax sovereignty costs – real or perceived –[36] nor possible political economy constraints, to further harmonization of excise taxes. Yet, that is not the deciding criterion; the deciding criterion is whether it is better or worse than no further harmonization, not least for the functioning of the internal market, and in light of the constitutional mandate in Article 113 TFEU. There are (nearly) no universal perfect decisions in taxation; most decisions entail some level of trade-offs, which can be bigger or smaller, depending on a variety of circumstances.[37] The best tax policy or enforcement decision is not one a one-size-fits all, but one that is based on an assessment of the main trade-offs at that moment in time, for a specific socio-economic setting, in a given country or jurisdiction. In this context, a new harmonizing directive that introduces a basic set of principles and rules to which all excise taxes – present and future – must abide in order to minimize distortions to competition and restrictions to free movement, without limiting too much Member States' freedom to impose new and/or more appropriate regulatory taxes, might be, on the balance of trade-offs – at this moment in time and given the current socio-economic challenges – the best tax policy solution for our Union. In any event, regardless of the decision eventually made, *action by inaction* is no longer a sustainable approach. A new dawn of excise taxation is here, and we must act before we are pushed.

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[36] Public perceptions have often a much more significant impact on tax policy design than traditionally acknowledged, *see* de la Feria & Walpole, *supra* n. 18.

[37] On the centrality of trade-offs for the design of tax systems, *see* R. de la Feria, *What is Tax Fairness?,* 33(4) EC Tax Rev. 142–145 (2024), doi: 10.54648/ecta2024018.